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NO. 92-1412

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

SHARON JOHNSON,

Petitioner,

vs.

SHIRLEY BURTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respectfully submitted,

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March 23, 1993

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DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Tova Indritz, declare under penalty of perjury that I am a member of the bar of this court and counsel for Respondent, Shirley Burton, and that I personally mailed a copy of the Brief in Opposition to Petition for Writ of Certiorari to this court by first class mail, postage prepaid by depositing the original and nine copies in an envelope addressed to the Clerk of this Court, in the United States Mailbox at the U.S. Post Office at 500 Gold SW, Albuquerque, New Mexico, at approximately 5:00 p.m. on the 23rd day of March, 1993.

Tova Indritz

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Shirley Burton, through her attorney who was appointed pursuant to the Criminal Justice Act, 18 U.S.C. §3006A, respectfully moves this Court to grant leave to continue to proceed in forma pauperis. In support of this motion, counsel states:

1. The Federal Public Defender Organization for the District of New Mexico is an organization organized pursuant to 18 U.S.C. §3006A(h)(2)(A).

2. Pursuant to the Criminal Justice Act, 18 U.S.C. §3006A, United States Magistrate for the District of New Mexico appointed the Federal Public Defender Organization for the District of New Mexico on August 14, 1987, to represent Ms. Burton before the U.S. District Court on her petition for a writ of habeas corpus filed under 28 U.S.C. §2254.

3. On March 3, 1990, the United States Court of Appeals for the Tenth Circuit appointed the Federal Public Defender for the District of New Mexico to represent Ms. Burton on the first appeal of her case to that court. On January 9, 1992, the United

States Court of Appeals for the Tenth Circuit appointed the Federal Public Defender for the District of New Mexico to represent Ms. Burton on her second appeal before that court.

4. Ms. Burton has requested that her appointed Federal Public Defender file a brief in opposition to the petition for certiorari filed by Sharon Johnson in this Court.

5. Ms. Burton continues to be indigent.

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Respondent, Shirley Burton, submits the following brief in opposition to Sharon Johnson's petition for writ of certiorari.

STATEMENT OF THE CASE

On August 9, 1984, Shirley Burton was convicted of the first degree murder of her husband, Robert Burton, after a jury trial held in Chaves County, New Mexico, district court. Burton v. Johnson, 948 F.2d 1150, 1153 (10th Cir. 1991)(hereinafter Burton I). Shirley Burton admitted that she shot and killed her husband in the early morning hours of August 14, 1983. She asserted that she did so in self-defense; she believed from Robert Burton's past behavior that she and her children were in immediate danger of great bodily harm, sexual abuse and death at his hands. Id. at 1151.

At the trial Shirley Burton testified that her husband beat, raped and sodomized her. He also frequently beat their son, Gene, who was 11 years old at the time of trial, and her daughter by a prior marriage, Elizabeth, who was 17 years old at the time of trial, with fists, whips, rope, halter, belts or whatever was handy. Id. at 1153. Ms. Burton's testimony regarding the physical abuse of herself and her children was corroborated by several witnesses, including Gene and Elizabeth Burton. Id., n. 4. Ms. Burton testified that she tried to leave her husband several times, but she had returned because he threatened to hurt her children. She had not contacted the police for protection because of his threats of retaliation if she did so. Id. at 1153.

In January, 1983, Ms. Burton learned that Robert had been sexually molesting their children for the past ten years. Elizabeth testified that her father had raped her twice and attempted to rape her on other occasions. Id. In May, 1983, Ms. Burton returned home and found Robert attempting to rape Elizabeth. Robert then badly beat Shirley Burton, ripped her clothes off and forcibly and painfully sodomized her, exclaiming that he could do whatever he wanted to against her and the children. Id. In June, 1983, Robert cut Shirley Burton with a knife. Stitches were required. Id. The day before the shooting, in front of Ms. Burton, Robert again attacked Elizabeth, angrily pushing her in the stomach and knocking her to the ground. Id. Ms. Burton testified that she shot and killed her husband in order to stop him from hurting or killing herself and her children. Id.

The defense presented expert testimony concerning "battered woman's syndrome" and the effects of long-term domestic violence. Ms. Burton had reached a state of absolute helplessness and desperation. It was the experts' opinion that Ms. Burton lived in constant fear for herself and her children and that when she shot her husband she believed her only recourse was to kill him. Id. The experts testified that, because Ms. Burton feared severe reprisals from her husband should she leave him or report his behavior to the police and because there were no successful structures established to deal with family abuse, Ms. Burton's decision to shoot Robert Burton was a reasonable one.

Nevertheless, the jury found Ms. Burton guilty of first degree murder. The trial court sentenced her to a mandatory term of life imprisonment. Id. at 1151. She served six years and one month of that sentence before being released by United States District Court Judge John E. Conway on appeal bond in January, 1990[1].

After exhausting her state remedies, Ms. Burton filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the District of New Mexico, challenging her conviction on a number of federal constitutional grounds. (Burton I, Document, ("Doc."), 1). On August 14, 1989, the United States Magistrate issued amended proposed findings and recommended that the petition be granted[2] and that Ms. Burton be released unless a new trial was held within 90 days. (Id., Doc. 45 at 22). The Magistrate found, among other things, that Ms. Burton's right to an impartial jury

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[1] In New Mexico a life prisoner must serve a minimum of thirty actual years in prison before becoming eligible for parole. A life prisoner under current prison practice does not receive any credit for good time to reduce his or her parole eligibility date. See N.M.Stat.Ann. §31-21-10(A) (1990 Repl. Pamp.); Martinez v. State, 772 P.2d 1305, 1306 (N.M. 1989). As the Tenth Circuit noted, Burton I, 948 F.2d at 1151, n. 1, Burton had been offered a seven year sentence for a plea to second degree murder, but she declined the offer and went to trial. Now, Ms. Burton has served more time in prison than she would have served had she accepted that offer and received the customary good time credit available to persons sentenced for second degree murder.

[2] The Magistrate's original findings held that Ms. Burton's constitutional rights were violated on three separate grounds; the amended findings found two constitutional violations. Only one ground was addressed by the United States Court of Appeals for the Tenth Circuit.

was violated because one of her jurors lived with an abusive husband and she failed to disclose that fact on voir dire.

On December 27, 1989, District Court Judge Conway entered an order adopting the Magistrate's amended proposed findings and the recommended disposition. In addition, the order stated:

> IT IS FURTHER ORDERED that the petition be, and it hereby is, granted. IT IS ALSO FURTHER ORDERED that the petitioner be released unless a new trial is commenced within 90 days.

Burton v. Johnson, 975 F.2d 690, 691 (10th Cir. 1992)(hereinafter Burton II). As Judge Conway has stated in an order dated November 23, 1992, (Petition for Writ of Certiorari, "Pet.", Appendix, ("App."), 2), by this order he intended that the state be afforded 90 days in which to commence a retrial of Ms. Burton, and that if the state did not commence the retrial within that time period, then the state would be permanently barred from ever retrying Ms. Burton, i.e., Ms. Burton would be "released" from her charges.

On December 29, 1989, Ms. Burton moved the district court, pursuant to Fed.R.App.P. 23(c), for her release pending either further action by the state or review by the Tenth Circuit Court of Appeals. Ms. Burton expressed a willingness to abide by any conditions set by the court and to appear for any retrial[3].

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[3] Warden Johnson notes in her certiorari petition that in Ms. Burton's release motion she asserted that the state would not be irreparably injured in the absence of a stay. (Pet. 5). The warden apparently wishes to imply that Ms. Burton had assured the court a stay of the writ granting order was not necessary to protect the state's interest in a new trial. This is not so. In her motion Ms. Burton assured the court that her release from

(Burton I, Doc. 49). A hearing on the motion was set for January 4, 1990. Warden Johnson filed a motion to vacate that hearing. In that motion, the warden acknowledged that it was her burden to overcome the presumption favoring Ms. Burton's release. (Id., Doc. 52). The warden's motion to vacate was denied.

On January 3, 1990, anticipating Ms. Burton's release from confinement, the state applied to the Chaves County district court for a bench warrant for Ms. Burton's arrest on the underlying murder charge and detention pending a hearing on conditions of release while the writ grant was reviewed on appeal by the Tenth Circuit. (Id., Doc. 54, Exhibit, ("Ex."), 1). Without notice to Ms. Burton or the federal district court, the Chaves County district court issued a bench warrant commanding Ms. Burton's arrest. (Id., Ex. 2).

On January 4, 1990, after a hearing on the matter, the federal district court entered an order setting conditions for Ms. Burton's release from incarceration. (Id., Doc. 53). Upon her enlargement that day from the Women's Correctional Facility in Grants, New Mexico, Ms. Burton was immediately arrested and held without bond on the state court warrant. (Id., Doc. 54 & 69). The federal district court claimed exclusive jurisdiction over the conditions of Ms. Burton's release and held the arrest

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prison would not harm the state. Her arguments had nothing to do with a stay of the retrial requirement, the deadline for which was almost three months away at the time she filed the release motion. Ms. Burton never made any contention that there was no need to stay the retrial deadline in order to preserve the state's ability to retry her.

unlawful. (Id., Doc. 54). The warrant was subsequently withdrawn by state district judge Schnedar on January 5, 1990[4]. Burton II, 975 F.2d at 691-692. Ms. Burton was released from prison on that date[5].

On January 24, 1990, warden Johnson filed a notice of appeal to the Tenth Circuit of the district court's order granting Ms. Burton's petition for habeas corpus relief. Ms. Burton cross-appealed certain claims resolved against her.

In accordance with the federal district court's order, on January 30, 1990, the Chaves County district court set the matter for a new trial on Ms. Burton's murder charge, to begin March 13,

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[4] The warden asserts that, by obtaining the issuance of the bench warrant, the state attempted to "rearrest and retry Ms. Burton." (Pet. 5). This is not true. As the application for bench warrant indicated, the state was attempting to detain Ms. Burton during the course of the warden's appeal, not for purposes of retrying her. Judge Conway was clearly right to preclude the state from usurping the federal judge's role in setting conditions for release on appeal of a federal court order. See U.S. ex rel. Thomas v. State of New Jersey, 472 F.2d 735, 741-744 (3rd Cir. 1973). By annulling the arrest warrant, the federal district court did not in any way prevent the state from retrying Ms. Burton. On the contrary, Judge Conway amended Ms. Burton's release conditions so that she could appear in state court for any pretrial hearings or any retrial and could visit her state court lawyer. (Burton I, Doc. 60).

[5] The warden insists that the state complied with Judge Conway's writ granting order by acceding to Ms. Burton's release. (Pet. 5, 9, 13). But, there were two parts to Judge Conway's order. First, the court granted Ms. Burton an immediate writ which entitled her to immediate release from custody. Secondly, he ordered that she be retried within 90 days. If she was not tried within that time frame, or the time period was not extended in some way, her retrial would be permanently barred. The state did accede to the court's order to physically release her from its custody. However, as related infra, the state did not comply with the second part of the order, i.e., to retry Ms. Burton by the court's deadline.

1990, within the 90-day period provided by Judge Conway. (Burton I, Doc. 69, Appendix A).

On March 6, 1990, well aware that Ms. Burton had already been released from confinement two months earlier, the warden filed a motion in federal district court seeking a stay of that court's order requiring a new trial within 90 days. (Id., Doc. 59). In her motion the warden assured the court that she did not seek Ms. Burton's re-arrest or the modification of Ms. Burton's release conditions. Rather, she requested a stay of that part of the order requiring a new trial within 90 days. A stay was necessary, she argued, to protect her right to appeal the writ granting order.

This stay motion makes it clear warden Johnson understood that under Judge Conway's December 27, 1989, order, the state would be barred from retrying Ms. Burton if the trial was not held within 90 days and a stay or reversal was not obtained. Since the warden did not contest Ms. Burton's physical release from custody, the warden had no reason to seek a stay or fear the loss of her right to appeal unless a permanent retrial bar was the sanction for a failure to meet the retrial deadline.

On March 8, 1990, Ms. Burton appeared through her state court counsel in Chaves County district court for a pretrial conference. At that hearing Ms. Burton announced that she was ready for a retrial any time within 90 days of the federal district court's order. However, the state prosecutor advised the trial court that the state was not ready to try the case. He

also informed the court that the attorney general was attempting to obtain a stay of the federal district judge's order. Judge Schnedar told the state he read that order to mean that Ms. Burton would be released from all charges if she was not tried within 90 days. Because the state was not ready to proceed, the trial judge vacated the March 13, 1990, trial setting, warning the state that it risked the consequences of failing to meet the federal court's deadline, if no stay was obtained. The trial court reset the case for trial on March 23, 1990, within Judge Conway's deadline. (Id., Doc. 72, attached transcript).

On March 12, 1990, the federal district court judge denied the warden's stay motion without explanation. On March 14, 1990, Ms. Burton's second state court trial setting was vacated at the state's request. The state did not appeal the denial of the stay or apply to the Tenth Circuit for a stay pursuant to Rule 8 of the Federal Rules of Appellate Procedure. Without the benefit of a stay of execution, the state failed to retry Ms. Burton within the 90-day retrial deadline set by Judge Conway, which expired on March 27, 1990. Burton II, 975 F.2d at 692.

On appeal before the Tenth Circuit neither Ms. Burton nor the warden raised the conditional nature of the order or the effect of the expiration of the 90-day period. Id. On November 1, 1991, the Tenth Circuit filed an opinion affirming the district court's grant of Ms. Burton's writ, holding that Ms. Burton had been denied her right to trial by an impartial jury. Burton I. The Tenth Circuit's mandate issued November 25, 1991.

As the Tenth Circuit stated in the second appeal in this case, its mandate did not provide a remedy superseding the remedy provided by the district court. Since neither party raised the remedy issue on appeal, the Tenth Circuit's mandate affirmed the remedy that accompanied the district court's grant of Ms. Burton's writ. Burton II, 975 F.2d at 693.

On December 2, 1991, following the return of the mandate, Ms. Burton filed a motion in the underlying habeas action seeking the entry of a final order prohibiting the state from retrying her on the murder charge. (Burton I, Doc. 69).

The warden repeatedly claims in her certiorari petition that this motion came as a complete surprise to her because she had no notice that Ms. Burton's retrial would be permanently barred if Ms. Burton was not retried by March 27, 1990. (Pet. 5, 6, 7, 13). This claim contradicts the language of the district court's writ granting order, the court's subsequent conduct, the warden's own actions and common sense. By directing that Ms. Burton's "Petition be, and it hereby is, granted," the federal district court granted Ms. Burton's writ effective immediately[6]. As a result, Ms. Burton was presumptively entitled to immediate release from state custody. See Carter v. Rafferty, 781 F.2d 993, 994 & n. 1 (3rd Cir. 1986) overruled on other grounds, Hilton v. Braunskill, 481 U.S. 770 (1987). See also Hilton, 481 U.S. at 774; Bowen, 799 F.2d at 614, n. 12; Fed.R.App.P. 23(c).

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[6] It was well within the court's discretion to do so. Bowen v. Maynard, 799 F.2d 593, 614, n. 12 (10th Cir. 1986).

That the district court "further ordered" that the state must release[7] Ms. Burton if a new trial was not held within 90 days obviously meant that upon the state's failure to meet the deadline, Ms. Burton would acquire something more than release from physical custody; rather, she would then be totally released from the murder charge itself.

Moreover, as the Tenth Circuit noted, Burton II, 975 F.2d at 964, the district court's subsequent actions indicated that Ms. Burton's permanent discharge was the sanction for failure to retry her within the established time period. As soon as possible after the order granting the writ, the district court ordered Ms. Burton's release from the state prison. The next day the court invalidated the state's re-arrest of Ms. Burton. Thus, by his conduct Judge Conway revealed his intent that Ms. Burton's petition be granted immediately and, as a consequence, that she must be released immediately. Had the judge intended to merely provide for Ms. Burton's physical release from state custody if no trial was held by March 27, 1990, he would not have ordered her release long before that deadline arrived. The court's conduct, consequently, showed that Ms. Burton would be permanently released from the murder charge if she was not retried within 90 days of the December 27, 1989, order[8].

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[7] Significantly, the court ordered simply that Ms. Burton be "released" when the deadline passed without a retrial, not that she be released from custody.

[8] Of course, this interpretation is borne out by the district court's subsequent explicit holding that it did, indeed, intend that Ms. Burton's retrial be permanently barred if the state failed

The warden understood this when that order was entered, contrary to the warden's claim now. At that time, the warden conceded that Ms. Burton was presumptively entitled to release immediately after the order, not after the 90-day deadline expired. In addition, as noted above, the state's stay motion acknowledged that Ms. Burton's retrial would be permanently barred if she was not retried by March 27, 1990, and the stay motion was not granted.

Nevertheless, the warden opposed Ms. Burton's December 2, 1991, motion to bar her retrial and demanded she surrender herself to be incarcerated pending her new trial. Ms. Burton filed a second habeas action challenging the state's authority to retry her and in that action sought a temporary restraining order, ("TRO"), and a preliminary injunction preventing the state from incarcerating and retrying her. (Burton II, Doc. 1 & 2). Following a hearing on December 6, 1991, the district court granted the TRO until a hearing on the preliminary injunction could be held on December 16, 1991. (Id., Doc. 6). At the latter hearing, ruling that he did not have the authority or jurisdiction to permanently discharge Ms. Burton, Judge Conway dissolved the TRO, denied the preliminary injunction and the motion for a writ permanently barring retrial. Burton II, 975 F.2d at 692.

Ms. Burton appealed the district court's decision in those regards to the Tenth Circuit. Ms. Burton also moved for an

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to retry her by the deadline it set. (Pet., App. 2).

injunction preventing a retrial pending the Tenth Circuit's disposition of the appeal. The Tenth Circuit granted that motion. Id.

On September 11, 1992, the Tenth Circuit issued its opinion upon the second appeal in this case. Burton II. The court ruled that a district court has the authority to permanently discharge a successful petitioner in a habeas corpus case "where it deems such a remedy appropriate." Id. at 693. The court also stated, however, that, in exercising its broad habeas corpus authority, "a district court may not abuse its discretion by ordering permanent discharge where such a remedy is unwarranted." Id. The court held, nonetheless, that the state was "precluded from obtaining substantive review of whether permanent discharge in the case at hand constitutes an abuse of the District Court's discretion." Id. The Tenth Circuit reasoned that, since neither party appealed the remedy issue in the first appeal, although the original December 27, 1989, writ granting order was an appealable final judgment, the parties had waived any challenge to the remedy prescribed by the order. Id. at 693-694.

Consequently, the Tenth Circuit remanded the case to the district court to interpret and clarify its December 27, 1989, order. The Tenth Circuit instructed the district court to interpret and clarify the order to reflect its contemporaneous intent and not to reflect a new and subsequent intent. Id. at 694.

Upon remand, on November 23, 1992, the district judge held

that at the time of the entry of its writ granting order, he intended that "the State be afforded 90 days in which to commence a retrial of petitioner, and that if the state did not commence the retrial within that 90 day period, then the state would be permanently barred from ever retrying petitioner." (Pet., App. 2). Accordingly, the district court permanently discharged Ms. Burton, forever barring the state from retrying her on the murder charge. (Id. 3).

SUMMARY OF THE ARGUMENT

Petitioner Johnson is seeking this Court's review of an issue which was not properly before the lower courts and is not properly before this Court. Warden Johnson asks this Court to determine the standards that govern the exercise of a federal district court's power to permanently discharge a successful habeas corpus petitioner. (Pet. i). But, as the Tenth Circuit Court of Appeals held below, Burton II, 975 F.2d at 694, the warden waived any contentions regarding a retrial bar by failing to appeal the permanent discharge remedy when it was initially imposed. As a consequence, the Tenth Circuit never reached the question the warden requests this Court to review.

The warden repeatedly claims the Tenth Circuit's decision in this case establishes a dangerous precedent setting district courts free willy-nilly to bar the retrials of successful habeas petitioners. This is clearly not true, since (a) the district court allowed the state 90 days to retry Ms. Burton and (b) the Tenth Circuit never even reached the issue of when permanent

discharges are appropriate. The Tenth Circuit did state in this case that "a district court may not abuse its discretion by ordering permanent discharge where such a remedy is unwarranted" and noted that generally barring retrial is not an appropriate remedy when a habeas corpus writ is granted. Id. at 693. This conclusion is very much in line with the case law of all the other federal circuit courts of appeal, including the cases cited by the warden in her petition.

Far from presenting issues of enormous importance, as the warden contends, this case presents a narrow, peculiar, fact-bound procedural issue that was decided in conformity with well-established authority and is not even raised as an issue in the warden's certiorari petition. This case involves a situation that is unlikely to ever recur, unless another warden is represented as ineptly as was warden Johnson. The warden had many opportunities to preserve the state's ability to retry Ms. Burton and took advantage of none of them. Because the warden has procedurally forfeited review of the question she presents in her petition and because the actual issue in this case is insignificant, fact-bound and not raised in the certiorari petition, this Court should deny certiorari.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

THIS COURT SHOULD DENY CERTIORARI IN THIS CASE BECAUSE THE CERTIORARI PETITIONER HAS FAILED TO PRESERVE THE QUESTION SOUGHT TO BE REVIEWED, THE TENTH CIRCUIT'S DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AND THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION.

The "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition." Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985). See also Canton v. Harris, 489 U.S. 378, 384 (1989). As a consequence, this Court is extremely loathe to address questions presented in a certiorari petition that have not been properly preserved for review. See Springfield v. Kibbe, 480 U.S. 257, 258-260 (1987); Cort v. Ash, 422 U.S. 66, 73, n. 6 (1975). This Court is particularly wary of reaching an issue which the court below has not addressed. See Hudson v. McMillian, 112 S.Ct. 995, 1002 (1992); U.S. v. Frady, 456 U.S. 152, 158, n. 7 (1982).

In this case, the warden has not preserved for this Court's review the question she presents in her petition for certiorari and, as a consequence, the court below, the Tenth Circuit, has not addressed the merits of the question. The warden asks this Court to decide what standards govern the exercise of a federal judge's power to permanently discharge a successful habeas petitioner. (Pet. i). As the Tenth Circuit ruled, Burton II, 975 F.2d at 694, the warden has waived any challenge to the federal district court's imposition of a retrial bar in this case. Thus, the warden has failed to preserve the question for

which she seeks certiorari review.

The Tenth Circuit held that the issue was not preserved because the warden had neglected to raise on her first appeal the issue of the remedy attached to the district court's granting of the writ. Id. at 693-694. This holding follows the well established principle espoused by every federal circuit court of appeal considering the issue that an argument which could have been raised on an initial appeal, may not be considered on a second appeal following a remand. See, e.g., Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 974 F.2d 502, 505 (4th Cir. 1992); McKnight v. General Motors Corp., 973 F.2d 1366, 1373 (7th Cir. 1992); Stinson v. Kaiser Gypsum Co., Inc., 972 F.2d 59, 61, n. 3 (3rd Cir. 1992); Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1106 (9th Cir. 1988); Lupo v. Rowland and Co., 857 F.2d 482, 484 (8th Cir. 1988); Laffey v. Northwest Airlines, Inc., 740 F.2d 1071, 1089-1090 (D.C.Cir. 1984); Crick v. Smith, 729 F.2d 1038, 1040 (6th Cir. 1984); Raxton Corp. v. Anania Associates, Inc., 668 F.2d 622, 624 (1st Cir. 1982). See 18 Charles A. Wright et al., Federal Practice and Procedure §4478 (1981).

As a result of its holding in this regard, the Tenth Circuit refused to address the issue of when permanent discharge was appropriate as a remedy upon the granting of a habeas corpus petition, i.e., the issue presented in the warden's certiorari petition. Burton II, 975 F.2d at 693-694. Instead, the Tenth Circuit remanded the case to the district court to carry out its

original intent with respect to barring retrial as the sanction for a failure to retry Ms. Burton by the court's deadline. Id. at 694. Since the warden has failed to preserve the question she presents in her petition and the Tenth Circuit did not address that question because of the preservation failure, it would be inappropriate to grant certiorari in this case. See Boeing Co. v. Van Gemnert, 444 U.S. 472, 480, n. 5 (1980)(refusal to consider an issue which was not raised on an initial appeal); Marsh v. Chambers, 463 U.S. 783, 793, n. 15 (1983)(refusal to review unappealed issue); Springfield, 480 U.S. at 259 (refusal to consider unpreserved issue); Cort, 422 U.S. at 73, n. 6 (similar); Hudson, 112 S.Ct. at 1002 (refusal to consider issue not addressed by the circuit court of appeals).

The warden predicts dire consequences if the Tenth Circuit's decision in this case is allowed to stand; she claims that the decision allows federal district courts to bar retrial for successful habeas applicants for any reason in any case. (Pet. 9, 10, 11, 12, 14, 15). Since the Tenth Circuit never even reached the question of the limits on the district court's power to permanently discharge a habeas petitioner, this is obviously a bogus argument.

Moreover, what the Tenth Circuit did say in this case on the standards governing the preclusion of retrial conforms with what the warden proposes and what other circuit courts of appeal have pronounced on the matter. The Tenth Circuit stated that, given its substantial power under 28 U.S.C. §2243, a federal district

court has the authority to permanently discharge a successful petitioner in a habeas corpus case. Burton II, 975 F.2d at 693. The warden apparently agrees with this proposition. (Pet. 12, 16-19)(citing with apparent approval cases that granted permanent discharge). The Tenth Circuit also stated that, in exercising its broad authority, "a district court may not abuse its discretion by ordering permanent discharge where such a remedy is unwarranted." Id. The court then noted that holding a conviction invalid and granting a habeas writ do not generally bar retrial on the original charge, citing a case, Bromley v. Crisp, 561 F.2d 1351, 1364 (10th Cir. 1977), in which the Tenth Circuit invalidated a permanent discharge. Burton II, 975 F.2d at 693. Thus, the Tenth Circuit in this case recognized the very point the warden makes in her petition, that district courts do not have unlimited discretion to provide a retrial bar as a remedy when granting a writ. Indeed, the Tenth Circuit indicated the district courts' discretion in that regard is considerably limited. The Tenth Circuit's remarks are very much in line with the holdings in all the cases from other circuit courts of appeal cited by the warden. (Pet. 16-18). The Tenth Circuit's decision does not give the district courts carte blanche, as the warden contends. The state, however, deprived the Tenth Circuit of the opportunity to substantively review the exercise of the permanent discharge discretion by the district court in this case by failing to raise the issue of the court's remedy during the first appeal.

The warden complains that the state was never given a real opportunity to correct the constitutional error in Ms. Burton's first trial by holding a second trial. (Pet. 10, 11, 12, 13). In fact, the state could have taken any of a number of alternative courses of action to preserve that opportunity, even aside from the obvious course of retrying Ms. Burton within the 90-day time period established by the district court. The warden could have sought clarification or modification of the district court's order, if it was confused or unhappy about the nature of the remedy provided for by the order. See Grasso v. Norton, 520 F.2d 27, 37-38 (2nd Cir. 1975). The warden could have sought an extension of the deadline. The warden could have appealed the district court's denial of its stay motion, in which the warden acknowledged that Ms. Burton's retrial would be permanently barred absent a stay. The warden could have sought a stay in the Tenth Circuit, pursuant to Fed.R.App.P. 8. The warden could have raised the retrial bar issue in her first appeal. The state took none of these simple options to preserve its chance to retry Ms. Burton. It is not unfair, then, for the state at this late date to be given no further chances. See In re Public Service Co. of New Hampshire, 963 F.2d 469, 472-473, 476 & n. 9 (1st Cir. 1992) (appeal of a bankruptcy court order confirming a reorganization was mooted when the appellant failed timely to seek a stay of the reorganization order).

The warden extols the value of federal-state comity and claims the Tenth Circuit's decision in this case undermines that

principle. (Pet. 11). In fact, the decision upholds that doctrine. In McClesky v. Zant, 111 S.Ct. 1454, 1469 (1991), cited by the warden, (Pet. 11), this Court proclaimed that the federal writ of habeas corpus overrode any considerations for the finality of state convictions "when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition." That is precisely what happened in this case. Ms. Burton raised a meritorious constitutional claim in a proper manner. She is entitled to federal habeas corpus relief.

On the other hand, the state in this case attempted to defy the federal courts' interest in finality. The federal interest in finality is as great as the states'. Frady, 456 U.S. at 169, n. 17. By raising the remedy issue on a second appeal after a remand the state was attempting to undermine the federal interest in finality and in resolving all the issues in a case at the earliest possible point in the proceedings. See Omni Outdoor Advertising, Inc., 974 F.2d at 505. The Tenth Circuit's decision precluding the warden from raising the retrial bar issue upheld that interest in this case.

In Coleman v. Thompson, 111 S.Ct. 2546 (1991), cited by the warden, (Pet. 11), this Court ruled that a habeas petitioner forfeited his right to present in the federal courts his federal constitutional claims challenging his death sentence because his attorney had filed a notice of appeal late in the state courts. Likewise, in this case, the state has forfeited its opportunity to retry Ms. Burton because it failed timely and properly to take

any of the procedural steps it could have taken to preserve that opportunity. It is now too late for the state to complain of the district court's retrial bar remedy.

The determinative matter in this case, then, is the effect of the procedural default by the warden. This is an issue not raised in the question presented by the warden in her certiorari petition. Consequently, that issue is not reviewable by this Court. See Lytle v. Household Manufacturing, Inc., 494 U.S. 545, 551-552, n. 3 (1990); Sup.Ct.R. 14.1(a)("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court).

Moreover, the real issue in this case is peculiarly fact-bound. Resolution of the issue depends on an analysis of the particular language of the district court's order and the specific conduct of the parties and the courts involved. Furthermore, the Tenth Circuit's determination of the issue was well within the mainstream of federal circuit case law. The issue raises no dispute among the circuit courts of appeal.

A petition for certiorari will be granted only for "special and important reasons." Rice v. Sioux City Cemetery, 349 U.S. 70, 73, 74 (1955); Sup.Ct.R. 10.1. "Special and important reasons" mean issues "beyond the academic or the episodic." Rice, 349 U.S. at 74. It is very important that certiorari not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties and where there is a real and embarrassing

conflict of opinion and authority between the circuit courts of appeal." Id. at 79, quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). The noncontroversial, procedural issue presented by this case, but not noted by the warden's certiorari petition, fails to qualify under this stringent standard.

This Court should not devote its scarce resources to this case. As the Tenth Circuit has held, the warden petitioner has failed to preserve the question for which she seeks review. The Tenth Circuit's opinion does not conflict with any decision by any other circuit court, and the warden points to no such decision. The determinative procedural issue was not listed by the warden as a question for which she sought review. The real issue in this case presents no important controversy and is inextricably tied to the rather complex facts of this peculiar case. This case is clearly not worthy of certiorari review. See Duncan v. Tennessee, 405 U.S. 127, 127 (1972).

CONCLUSION

For the reasons set forth above, respondent Shirley Burton requests that this Court deny warden Johnson's petition for certiorari.

Respectfully submitted,

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Attorney for Respondent

NO. 92-1412

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

SHARON JOHNSON,

Petitioner,

vs.

SHIRLEY BURTON,

Respondent.

CERTIFICATE OF SERVICE

I, Tova Indritz, declare under penalty of perjury that I am a member of the bar of this court and as counsel for Shirley Burton, Respondent, that I personally mailed a copy of the Brief in Opposition to Petition for Writ of Certiorari by first class mail, postage prepaid to Mary Catherine McCulloch, Assistant New Mexico Attorney General, P.O. Drawer 1508, Santa Fe, NM 87504-1508, this 23rd day of March, 1993.

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March 23, 1993

Mr. William K. Suter, Clerk
United States Supreme Court
Washington, DC 20544

Re: Sharon Johnson v. Shirley Burton
No. 92-1412

Dear Mr. Suter:

Enclosed are original and nine copies of Brief in Opposition to Petition for Writ of Certiorari in the above-referenced case.

Sincerely,

Tova Indritz

Tova Indritz
Federal Public Defender

TI:mga

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